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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

MARC A. NEWMAN,

Petitioner,

v.

ECKERD CORPORATION, a wholly Owned Subsidiary of J.C. Penney Company, Inc.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTIONS PRESENTED

(1) Should this Court resolve the conflict between the United States Court of Appeals for the Eleventh Circuit and the United States Court of Appeals for the First Circuit on the question of whether the determination of the existence of a *Prima Facie* case of Age Discrimination is a decision for the Court or a decision for the Jury in the case?

(2) Should this Court resolve the conflict between the United States Court of Appeals for the Eleventh Circuit and the United States Court of Appeals for the Seventh Circuit on the question of whether a younger employee promoted to a position at the exact same time an older employee is removed from a position carrying the same job title must perform exactly the same duties in the position in order to be deemed to have "replaced" the older employee for purposes of establishing a *Prima Facie* case of Age Discrimination?

(3) Was the decision of the Eleventh Circuit Court of Appeals granting Summary Judgment to the Respondent in the case before the Court so violative of Petitioner's Seventh Amendment Right of Trial by Jury and of this Court's decision in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) that this Court should exercise its power of supervision to vacate (or order vacated) the Summary Judgment rendered against Petitioner in the Courts below?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marc A. Newman ("Petitioner" or "Newman") hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

The United States District Court for the Northern District of Georgia granted Summary Judgment for Respondent and against Petitioner in his claim against the Respondent for violation of the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*) (ADEA). Petitioner appealed that decision to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals for the Eleventh Circuit summarily affirmed the grant of Summary Judgment in a *de novo* opinion on considerably narrower grounds than were contained in the decision of the District Court.

The Petitioner respectfully submits that the Judgment against him is in conflict with the opinions of two other Circuit Courts, and of this Court, and represents an unconstitutional usurpation from the jury of fact-finding authority by both the District Court and the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit is set forth as Appendix A (App.1-App.4). The Opinion of the United States District Court for the Northern District of Georgia is set forth as Appendix B (App. 5-App. 22) to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 18, 2000. This Court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 29 U.S.C. §§ 621 *et seq.* is set forth in Appendix C (App. 23-App. 57) to this Petition.

STATEMENT OF THE CASE

Respondent is a Corporation that operates retail drug stores in various geographies within the United States. Petitioner has been an employee of Respondent for approximately twenty-nine (29) years. For more than eighteen years Petitioner's job responsibilities required him to supervise the operation of varying numbers of stores owned and operated by the Respondent in various geographies, primarily in the Southeastern United States. The Petitioner's specific job title changed several times during the eighteen year period Petitioner performed this

supervisory position with Respondent from which he was unlawfully demoted in January 1998. Some details of the actual job responsibilities of this supervisory position, such as the numbers and locations of Respondent's stores Petitioner managed, changed from time to time during his eighteen year tenure in the position. However, at the time of Petitioner's demotion, Petitioner held a position entitled District Operations Manager (DOM) for Respondent. Prior to his demotion, Petitioner supervised the overall operation of approximately 30 of the Respondent's stores located in Northeast Georgia in Respondent's Mid-South Region.

At the time of his demotion, Petitioner was managed by a Regional Vice President, Douglas Sheasley (Sheasley). Sheasley managed Petitioner and nine other DOMs in the Mid-South Region of Respondent. The Mid-South Region encompassed parts of Mississippi, Alabama, Georgia and Tennessee. Before Petitioner's demotion, there were ten (10) DOMs in the Mid-South Region, including Petitioner. After Petitioner's demotion, Sheasley continued to manage ten (10) DOMs, in the Mid-South Region, including a new DOM, Scott Defriese ("Defriese").

The Respondent has a four-step corrective action and discipline policy which requires verbal counseling, and two separate written warnings prior to an adverse employment action being taken against an employee of Respondent. In the Court below, there was conflicting testimony as to whether or not Petitioner ever received any of the counseling required by the Respondent's policy. The District Court below ultimately concluded that Respondent followed some of its corrective action and

discipline policies in its demotion of Petitioner, notwithstanding Petitioner's testimony that he had not been counseled and notwithstanding the lack of any of Respondent's counseling forms in Petitioner's personnel file. The District Court also found that Respondent was not required to follow other components of its corrective action and discipline policy (App. at 21). Petitioner asserts that the failure to comply with policy prevented him from being apprised of any performance deficiencies and denied him an opportunity to correct any performance deficiencies, if any such deficiencies actually existed.

On January 12, 1998, Sheasley advised Petitioner that he was being removed from his position as DOM effective at the close of the Respondent's fiscal year which ended at the end of January 1998. Petitioner was forty-five years old at the time of this employment action. Contemporaneously with this notice of Petitioner's removal from his DOM position, Sheasley announced that Dennis Mack ("Mack") would begin supervising the operation of most of the stores in Northeast Georgia. Prior to January 12, 1998, Mack was responsible for supervision of stores located in Mississippi, and Mack is approximately the same age as Petitioner. For a short period of time following Mack's transfer to the Northeast Georgia area, Mack began supervising most, but not all, of the stores in Petitioner's former "district" for approximately two months. After approximately two months elapsed following Petitioner's demotion, the organization of some of the stores in the Mid-South Region was changed. As a result of this "reorganization," Mack continued to manage approximately half of the stores in Petitioner's former

"district," and a DOM named Jeff Morgan began to manage the remainder of the stores of Petitioner's former "district." Also on January 12, 1998, simultaneously with Sheasley's announcement that he was removing Petitioner from his DOM position, Sheasley announced that Defriese, a thirty-three year old store manager from Tennessee, would be promoted to DOM supervising the stores in Mid-South Region located in Mississippi beginning with the new fiscal year at the end of the month.

At the time Petitioner was notified that he was being removed from his DOM position, Sheasley indicated to Petitioner that he had a plan to have Petitioner transferred to a lateral staff position in Respondent's corporate headquarters in Clearwater, Florida. However, within two months of his removal from the DOM position, Petitioner was told that his only option was to accept a demotion to the position of store manager for one of the Districts in the Mid-South Region. The demotion to store manager resulted in a substantial reduction in Petitioner's pay and benefits.

On July 1, 1998 Petitioner filed a lawsuit under 29 U.S.C. § 621 *et seq.* against the Respondent seeking damages for Petitioner's wrongful demotion and seeking reinstatement to his former position as District Operations Manager. After the completion of discovery, Respondent filed a Motion for Summary Judgment. In his affidavit in response to the Respondent's Motion for Summary Judgment, Petitioner testified that he had performed the "DOM position" for the Respondent for more than eighteen years, and that all the DOM positions within Respondent were the same. In its Motion for Summary

Judgment, as is required by law, the Respondent articulated a non-discriminatory reason for Petitioner's demotion. The articulated reason for Petitioner's demotion was Petitioner's alleged poor performance. In describing Petitioner's alleged performance deficiencies, Petitioner's performance was compared with that of the other nine DOM's in Sheasley's region. Respondent's allegations of performance deficiencies were contradicted by documentary evidence and the sworn affidavit of Petitioner.

The District Court applied the now familiar *McDonnell Douglas* test to determine whether Petitioner had established a *prima facie* case of Age Discrimination. The District Court held that the Petitioner had demonstrated the first two elements of a *prima facie* case under ADEA, specifically the Petitioner had demonstrated that he was protected by the statute, and that he had suffered an adverse employment action. However, the District Court also ruled that Petitioner failed to demonstrate the remaining two elements of a *prima facie* case.

Specifically, the District Court ruled that Petitioner had not demonstrated that he was capable of performing the position he had actually held and performed for the Respondent for approximately eighteen years with performance appraisals always fully satisfactory or higher. In doing so, the District Court made numerous findings of fact, a number of which were directly and specifically contradicted by Petitioner's affidavit, and/or Petitioner's documentary evidence submitted in opposition to the Motion for Summary Judgment.

In addition, the District Court held that Petitioner had not demonstrated that he had been replaced by a

substantially younger person. The District Court ruling came notwithstanding the fact that on the exact same day Sheasley announced that Petitioner was being removed from one of ten DOM positions within the Mid-South Region, Sheasley promoted a much younger employee to fill one of the ten DOM positions within the Mid-South Region.

The District Court also ruled that while it did not have to address the issue given the lack of showing of a *prima facie* case, no evidence of pretext existed in Respondent's articulated reasons for its employment action. It made this ruling notwithstanding documentary evidence and affidavits to the contrary.

On appeal the Eleventh Circuit hearing the case on a *de novo* basis, issued a much narrower decision, and held only that Mack replaced Petitioner, that Mack was not substantially younger than Petitioner, and consequently, Petitioner failed to satisfy one of the critical elements required to establish a *prima facie* case, specifically that Petitioner had been replaced by an individual who was substantially younger than Petitioner. The Eleventh Circuit thus affirmed the grant of Summary Judgment.

REASONS FOR GRANTING THE PETITION

This is an important case notwithstanding the fact that neither the opinion of the District Court nor the opinion of the Court of Appeals has been reported.

It is important because the District Court for the Northern District of Georgia and the U.S. Court of

Appeals for the Eleventh Circuit have denied the Petitioner's fundamental rights to trial by jury on his ADEA claim as guaranteed by both the Seventh Amendment to the Constitution and by the ADEA statute itself, specifically 29 U.S.C.A. § 626(c)(2). Those Courts have also issued rulings in conflict with Decisions of this Court and of two other Circuit Courts of Appeals.

1. The Petition Should be Granted Because the Decision of the United States Court of Appeals for the Eleventh Circuit is in Conflict With the Decision of the United States Court of Appeals for the First Circuit.

In *Keisling v. Ser-Jobs For Progress, Inc.*, 19 F.3d 755 (1st Cir. 1994), the First Circuit clearly notes that the decision as to whether a *prima facie* case has been established by a Plaintiff in an Age Discrimination case is one for the jury. Specifically, the Court held at page 760:

> Defendants have failed to show that, viewing the evidence in a light most favorable to Kiesling, **no reasonable jury could conclude** that Keisling established the third element of the *prima facie* case. [emphasis added].

In the proceedings below, it is clear that both the District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit made the factual determinations critical to the issue of the existence of a *prima facie* case themselves. As such, Petitioner maintains that each Court has engaged in an inappropriate exercise of weighing the evidence in the case. The District Court determined 1) that Newman was

"no longer capable of performing his position,"[1] and 2) that Newman was replaced by Mack. The first component of the District Court's decision regarding the existence of a *prima facie* case was apparently ignored by the Court of Appeals since it did not address this issue in its decision. The second component of the District Court decision was made notwithstanding the contemporaneous promotion of Defriese to DOM in the Mid-South Region at the time of Newman's removal from his DOM position in the same Region, and Newman's uncontroverted affidavit testimony which indicated that the DOM position was the same throughout the Country, regardless of the Region, but certainly within the Mid-South Region. The Court of appeals made its decision to grant Summary Judgment solely on this second ground of the District Court opinion.

There is no acknowledgment in the decision of either Court below that the question as to whether Petitioner had established the required elements of a *prima facie* case was a decision for the jury. Neither Court identified the specific evidence missing from Petitioner's case that took

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[1] Petitioner maintains that the District Court improperly applied the *McDonnell Douglas* test in this case. Petitioner maintains that in this case Petitioner clearly demonstrated that he was capable of performing the position of DOM for Respondent since he had actually successfully performed the position for more than eighteen years. The District Court confused Respondent's articulated reason for the adverse employment action with evidence required to establish a *prima facie* case. Thus the burden of proof relating to establishing a *prima facie* case was changed from "Petitioner showing he was capable of performing the job" to "Petitioner being required to show that he was actually performing the job well."

the question out of the jury's hands. Both Courts below have ignored evidence on the record from which a neutral fact-finder might conclude that Newman had shown the elements required to establish a *prima facie* case and made their own decisions to the contrary on these issues based on their view of the totality of the evidence.

Specifically, Petitioner submitted evidence that showed that he had performed the "DOM" job for Respondent for more than eighteen years, that the DOM position was the same position throughout the Respondent nationwide (specifically Petitioner testified that "a DOM is a DOM is a DOM"), and that the Petitioner's performance appraisals had always been at least fully satisfactory.[2] Thus the Courts below ignored evidence from which a reasonable fact-finder could conclude 1) that Petitioner was "capable" of performing the DOM position, and 2) that he was capable of performing the DOM position for the Respondent's stores in Mississippi.[3]

In addition, with regard to the District Court's decision that Petitioner had not shown he "continued to be

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[2] The District Court below found that the Respondent's records indicate that at the time he was removed from his position, Newman had a below average performance appraisal. However, Petitioner testified that no formal performance appraisal was ever delivered to him nor was such an appraisal included in Petitioner's personnel file.

[3] Since Petitioner testified that the DOM position which he had successfully performed for eighteen years was essentially the same throughout the Country, the DOM position was the same in Mississippi as in any other District within Respondent's organization.

able to perform the position," Petitioner introduced documentary evidence relating to audits of the financial performance of the stores in his district conducted just prior to his demotion. Those audits revealed that Petitioner's performance levels in terms of generating operating profit from store operations was one of the best of all the districts in the Mid-South Region. Petitioner also introduced audit information of store conditions that showed that the conditions of his stores were higher on average than the stores in other districts in the Mid-South Region. Thus Petitioner had documentary evidence that might persuade an unbiased fact-finder to conclude that his financial performance was one of the highest of all the DOMs in the Region, and that he was doing well in managing the conditions of the stores in his district. Petitioner asserts that from this evidence a neutral fact-finder might reasonably conclude that Petitioner continued to be able to perform the DOM position if that is indeed the appropriate *McDonnell Douglas* test criteria for the fact-finder in this case.

Finally, Petitioner provided evidence from which a neutral fact-finder could conclude that Defriese replaced Petitioner. Defriese was an employee of a store in Tennessee, so regardless of whether Defriese or Petitioner was given the Mississippi DOM position, Respondent would have been required to relocate either to the new geography. Moreover, Defriese was promoted to the DOM position in the Mid-South Region on the very same day that Newman was told he was being removed from the DOM position in the Mid-South Region. It is also clear from the evidence that the assignment of Mack to manage most of the stores in Petitioner's last district assignment was only

a stopgap measure pending a reorganization of some of the stores in the Region. Within less than two months from Petitioner's demotion, the stores in the Region located in Northeast Georgia, including Petitioner's former stores, were reorganized. Mack stopped supervising approximately half of Petitioner's former stores within two months of Petitioner's removal from his position. A stronger argument can be made that no single person replaced Petitioner, than the decision made by the Courts below that Mack replaced Petitioner. Thus, the finding by both the District Court and the Court of Appeals that Mack replaced Newman is suspect from the totality of the evidence in the case. It is a decision that quite frankly a reasonable jury is unlikely to make. The important point is that the decision by both the District Court and the Court of Appeals on this issue isn't the only reasonable conclusion that can be drawn by a review of the evidence by an unbiased fact-finder, and as such it is clearly erroneous.

If the Eleventh Circuit is correct and the decision regarding the existence of a *prima facie* case is one exclusively for the Court, then the Courts below have viewed the evidence and drawn conclusions in light most favorable to the moving party in violation of Rule 56 F.R.C.P. Both Courts below completely ignored the testimony of Petitioner that a DOM is a DOM is a DOM, the documentary evidence of Petitioner's performance, and the evidence that on the same day Petitioner was removed from his DOM position, Defriese was promoted to DOM in the same region. However, if the decision on whether Petitioner has established a *prima facie* case is a decision for the jury as the First Circuit has ruled, then the Court of

Appeals for the Eleventh Circuit has overstepped its power in this case by usurping this decision from the jury.

2. The Petition Should Be Granted Because the Decision of the United States Court of Appeals for the Eleventh Circuit is in Conflict With the Decision of the United States Court of Appeals for the Seventh Circuit.

In *Miller v. Borden, Inc.*, 168 F.3d 308 (7th Cir. 1999) the Seventh Circuit was confronted with a fact situation which is similar in nature to the case presently before this Court. In *Miller*, instead of a DOM position relating to a finite set of stores, *Miller* involved a sales representative with a finite set of accounts. In *Miller*, the defendant employer argued that since no single employee was assigned to handle Miller's sales territory after his termination from employment (which was defined by the accounts in the territory), Miller was not replaced by a single sales representative, and that Miller could not establish that he was replaced by a younger person or by anyone for that matter.

The Seventh Circuit disagreed with the employer, and held that when examining cases of this nature one must look at the "fungibility" factor of the positions held by the employees in question. Specifically, the Court held at page 313 that:

> In the "fungibility" type situation, all the employee needs to establish is that he was *treated* less favorably than one or more similarly situated employees. . . . Thus, an employer who discharges a protected employee and

> **either hires or retains younger employees "to fill positions for which the older employee was qualified" bears the burden of explaining its actions. . . . [emphasis added].**

In the case presently before this Court, Sheasley announced that Petitioner was being removed from a position as one of ten DOMs in the Mid-South Region of Respondent, on the same day that Sheasley announced that a person twelve years Petitioner's junior was being promoted to one of ten DOM positions in the same Mid-South Region of Respondent. Petitioner maintains, notwithstanding the District Court decision on this issue, that he was qualified to perform the DOM position, since he had actually performed in the position for eighteen years with fully satisfactory and sometimes above average performance appraisals.

The focus by both Courts below on specific stores Petitioner managed in determining the identity of the person who replaced Petitioner in the Respondent's employ was inappropriate in the circumstances. An unbiased fact-finder could conclude that the Respondent's DOM position is essentially the same throughout the Country and is most certainly the same position within the same Region of the Respondent where those DOMs are all managed by the same Vice President. Using the Eleventh Circuit's rationale, a 60 year old file clerk responsible for "a-d" files in an employer's file system can be fired and be essentially replaced with a 20 year old file clerk with no *prima facie* case of age discrimination having been established. The only requirement to avoid establishment of a *prima facie* case under the Eleventh Circuit's theory of the law is that the employer must be

careful to reassign a 55 year old file clerk handling the "e-g" files to the "a-d" files and then assign the 20 year old new hire to the "e-g" files. The logic of the Seventh Circuit is much more sound than that of the Eleventh Circuit.

In deciding on whether a new hire replaced a demoted employee, one must determine whether a younger person is either hired or retained to perform a job similar to the one held by the employee being demoted or one which the demoted employee is clearly capable of performing. If such a circumstance exists, Petitioner asserts that this specific element of the *prima facie* case is established. The Eleventh Circuit approach to the issue is an unnecessarily convoluted approach to the issue, and the rigidity of the test criteria results in failure to enforce Congress's purposes in enacted ADEA, i.e., to help protect the employment security of persons over the age of forty.

3. The Petition Should be Granted Because the Decision of the Eleventh Circuit Applies Rule 56 F.R.C.P. in such a way as to Deny Petitioner's Seventh Amendment Right to Trial by Jury.

Finally, an issue of utmost importance in this case is the fundamental denial of Petitioner's statutory and Constitutional Right to trial by jury in an ADEA case. A primary role of this Court is the supervision of the Federal Court System of this Country to ensure that no such violations of such fundamental rights occur in cases like the one presently before this Court.

Petitioner asserts that the District Court decision in this case indicates a desperate need for this Court to clarify the application of Rule 56 F.R.C.P. In the case presently before this Court, a college-educated, experienced, District Court Judge issued a Decision in which he held that Petitioner could not show, as a matter of law, that he was capable of performing the DOM position for Respondent. This decision was rendered in the face of clear evidence that Petitioner had performed the DOM position in the Respondent's employ for a period of eighteen years with "fully satisfactory" and "above average" performance appraisals. If Petitioner cannot show, as a matter of law, for the limited purposes of establishing a *prima facie* case, that he was capable of performing the very position he had performed very successfully for a period of eighteen years, then Petitioner asserts that no claimant in the Eleventh Circuit can establish this element of a *prima facie* case in which the *McDonnel Douglas* test is applied. If the foregoing interpretation of the Court's decision is accurate, such a decision would be contrary to Congressional intent in enacting ADEA. If the foregoing interpretation is not accurate, then the Summary Judgment Decision entered against Petitioner by the District Court was entered in an arbitrary and capricious fashion. If the decision in this case is arbitrary and capricious, it necessarily follows that there are no objective or reasonable standards for the grant of Summary Judgment guiding Courts in their decisions on Rule 56 Motions in the Eleventh Circuit. Emphasizing the serious problem that now exists for Courts in this Circuit, this decision comes in the face of decisions from this Court which state that burden of proof required to establish any of the elements

of a *prima facie* case in ADEA type cases is not an onerous burden. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981).

Contrary to the District Court decision, Petitioner asserts that if he is allowed to submit the issue of whether he was capable of performing the position of DOM within the Respondent to a jury of his peers, an unbiased fact-finder would conclude given Petitioner's employment history that Petitioner was indeed capable of performing the position. In fact, Petitioner is relatively certain that Respondent would not even attempt to argue the existence of this element of the *prima facie* case for fear of alienating the jury.

Petitioner also asserts that unlike both Courts below, an unbiased jury of his peers would find that Petitioner was in fact "replaced" by the considerably younger employee, Defriese. Petitioner's testimony that the DOM position is the same job regardless of the territory in which it is being performed on behalf of Respondent has not been contradicted by the Respondent. Respondent focused its proof on showing that Petitioner managed approximately thirty stores in Georgia, and that after he was removed from his position, Mack managed most of those stores for approximately a two month period and thus "replaced" respondent. Respondent has not shown a different job title or list of job responsibilities (other than the specific store locations managed by the DOM) existed for any of its DOMs in the Mid-South Region or any of its DOMs in its other Regions. In the face of this uncontroverted evidence that a DOM is a DOM is a DOM, Petitioner assumes the jury will conclude that within the Respondent's organization, a DOM is a DOM is a DOM.

The evidence is also uncontroverted that on the same day Sheasley announced that Petitioner was going to be removed from his position as DOM in the Mid-South Region, Sheasley announced that Defriese was being promoted to DOM within the Mid-South Region, effective on the same day as Petitioner's demotion. Petitioner asserts that a reasonable fact-finder may conclude that given the fact that a DOM is a DOM is a DOM, Defriese "replaced" Petitioner in the Mid-South District.

Because of these facts, Petitioner's fundamental Seventh Amendment Rights to trial by jury were denied by the arbitrary and capricious application of Rule 56 F.R.C.P by the Courts below. While it may be possible for a jury to conclude that Mack replaced Newman, such a decision, given all the evidence in the case, is not mandatory. Unless the decision is a mandatory one, the grant of Summary Judgment is inappropriate. Any other approach, including the approach used by the Courts below, results in a usurpation of fact-finding authority from the jury to the Courts in violation of the Seventh Amendment to the United States Constitution.

In addition, it is also apparent that while the Courts below cited *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) as their basis for granting Summary Judgment to Respondent, the Courts below ignored the language in the *Celotex* opinion relating to the evidence, or more specifically, the lack of evidence, which must be shown by a moving party in order to be entitled to the grant of Summary Judgment. In *Celotex* this Court specifically held that the *Celotex* decision did not overrule the decision of this Court in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and thus *Adickes* is still controlling law. The

decision of the Courts below in the case currently before this Court is clearly in conflict with *Adickes*, and one must conclude from the opinion by the Eleventh Circuit in this case that *Adickes* is simply no longer good law in the Eleventh Circuit. This conclusion results from the fact that it is apparent that a Plaintiff cannot simply identify to a Court in the Eleventh Circuit a single evidentiary fact from which a jury might rule in favor of the Plaintiff on a question of fact and avoid the grant of Summary Judgment by such Court on that question.

Petitioner does not believe that he is being singled out for this inappropriate application of Rule 56 F.R.C.P. by the Courts in the Eleventh Circuit. As noted above, Petitioner believes there is no clear guidance to Courts in the Eleventh Circuit on the appropriate application of Rule 56 F.R.C.P., and that all the decisions in the Eleventh Circuit on Summary Judgment issues are arbitrary and capricious exercises. Therefore, it is critical that this Court issue new guidance to the Courts below on the circumstances which must exist before grant of Summary Judgment is appropriate. It is Petitioner's assertion that the Courts in the Eleventh Circuit have adopted a course of action that entails their weighing of evidence submitted by the Parties in Summary Judgment proceedings, and using this exercise to usurp fact-finding authority from juries. This is contrary to Rule 56 F.R.C.P. which requires that the Court examine whether evidence exists to support a non-moving Party's claims, viewing that evidence in a light most favorable to the non-moving Party. This weighing of evidence is clearly contrary to the Seventh Amendment of the United States Constitution.

One of the clearest demonstrations that the process described above is occurring in Courts in the Eleventh Circuit occurred in the case presently before this Court. It is now clear that Courts in the Eleventh Circuit are deciding that employees who have successfully performed jobs within an employer for eighteen years are not capable of proving that they can perform their positions within that employer as a matter of law. Under Rule 56 F.R.C.P. and the Seventh Amendment to the United States Constitution this is an inappropriate intrusion into the jury's exclusive authority. The Court's role must be limited to trying to decide whether evidence exists (such as the claimant having actually performed the position very well for eighteen years) from which a jury could reach an entirely different conclusion from the opinion held by the Judge in the case.

In allowing this misuse of the Rule 56 F.R.C.P. process by Parties, the Courts in the Eleventh Circuit are looking almost exclusively at needlessly voluminous Motions for Summary Judgement.[4] The Courts are not taking an opportunity to view the demeanor of the witnesses providing such evidence, as a jury would, or to judge the credibility of those witnesses. In addition, the Courts are not examining the biases to which the witnesses providing the evidence may be subject, as a jury would, in evaluating the strength or credibility of the

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[4] Petitioner maintains that these voluminous Summary Judgment Motions are designed by Defendants to subconsciously encourage this inappropriate weighing of evidence to occur by Judges at this stage of the proceedings.

evidence on which the Courts are making their inappropriate decisions. They are looking at how many affidavits are filed, their length, and the number of undisputed facts alleged by the moving party, rather than whether there is sworn testimony that contradicts that evidence. The Courts are literally looking at the volume of evidence offered, not the content, and thus the inappropriate "weighing" of evidence has become a literal, in addition to a figurative, problem. The net result in the case presently before this Court was a usurpation of the fact-finding role by the Court from the jury. Given these results, the application of Rule 56 F.R.C.P. by Courts below in this case has resulted, by definition, in an unconstitutional denial of Petitioner's Seventh Amendment Right to trial by jury. Petitioner believes that he cannot possibly be a solitary victim of this kind of arbitrary, capricious and unconstitutional denial of rights to trial by jury in the Eleventh Circuit. This Court should use this case to issue clear guidance on the appropriate use of Rule 56 F.R.C.P. to stop this arbitrary and capricious denial of Constitutional rights by Courts in the Eleventh Circuit.[5]

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[5] Petitioner asserts that while Rule 56 F.R.C.P. was adopted to foster judicial efficiency, preparing Summary Judgment motions and their responses are more time-consuming and expensive to litigants than the actual trial itself in a great number of cases, and the Motions invariably delay the proceedings. In short, there is nothing "efficient" in the modern Rule 56 Motion Practice.

CONCLUSION

For the reasons set forth herein, this Petition for Writ of Certiorari should be granted.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11885

Non-Argument Calendar

D.C. Docket No. 98-01871-CV-CC-1

MARC A. NEWMAN,

Plaintiff-Appellant,

versus

ECKERD CORPORATION, a wholly owned subsidiary of J.C. Penney Company, Inc.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed October 18, 2000)

Before COX, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Marc A. Newman appeals the district court's order granting summary judgment for Eckerd Corporation in his suit under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. In his complaint, Newman alleged that Eckerd demoted him from his former position as a district operations manager ("DOM") to store

manager on account of his age, and that Eckerd promoted a younger person to his former position. On appeal, Newman argues that the district court erred by entering summary judgment for Eckerd on the ground that he failed to make out a *prima facie* case of age discrimination, and that Eckerd had a legitimate, non-discriminatory reason for demoting him, which Newman had failed to show was pretextual.

We review *de novo* the grant of summary judgment, applying the same standard used by the district court and viewing the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. *See Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1357-58 (11th Cir. 1999). Summary judgment is appropriate "[when] the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

To establish a *prima facie* case of age discrimination based on circumstantial evidence, Newman was required to present sufficient evidence that: (1) he was a member of the protected group of persons between the ages of 40 and 70; (2) he was subject to adverse employment action; (3) a substantially younger person filled the position from which he was demoted; and (4) he was qualified for the position. *See Damon*, 196 F.3d at 1358 (citing *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998)).

After reviewing the record and the parties' briefs, we conclude that Newman failed to present sufficient evidence that a substantially younger person filled his

former position. *See Damon*, 196 F.3d at 1358. At the time Newman was demoted, he was 45 years old and the DOM for the Northeast Georgia District; Dennis Mack, the individual selected to fill Newman's former position, was 45 years old and was the DOM for a different district. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (1996) (explaining that inference of age discrimination "cannot be drawn from the replacement of one worker with another worker insignificantly younger").

Scott DeFriese, then a 33-year old Eckerd store manager, was chosen to replace Mack. Newman contends that DeFriese rather than Mack replaced him, but because he failed to present evidence to show that DeFriese, in his new capacity, performed at least some of Newman's former duties, we cannot say that the district court erred in finding to the contrary. *See Hawkins v. Ceco Corp.*, 883 F.2d 977, 982 (11th Cir. 1989) (explaining that "[w]here the employee's position is clearly delineated and responsibilities are well defined, the court should focus on the person that physically replaced the employee," and that plaintiff is required to show that "a purported replacement actually performed [his] duties"). Because Mack was the same age as Newman, we conclude that Newman failed to establish an essential element of a *prima facie*

case of age discrimination. Accordingly, the district court did not err by granting summary judgment to Eckerd.*

AFFIRMED.

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* For this reason, Newman's claim that the district court violated his Seventh Amendment right to a jury trial is without merit. *See Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980) ("Summary judgment is authorized where there are no issues of material fact in dispute. In such circumstances the jury, as trier of fact, has no role, and appellant's seventh amendment rights are not infringed."); *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*) (adopting as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981).

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARC A. NEWMAN	:	CIVIL ACTION NO.
Plaintiff, vs.	:	1:98-CV-1871-CC
ECKERD CORPORATION, A WHOLLY-OWNED SUBSIDIARY OF J.C. PENNY [sic] COMPANY, INC.,	:	

ORDER

(Filed March 20, 2000)

Pending before the court in this employment discrimination action is Defendant Eckerd Corporation's ("Eckerd") Motion For Summary Judgment [Doc. No. 12-1]. Plaintiff Marc A. Newman ("Newman" or "Plaintiff") has brought this action alleging that Eckerd demoted him because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et. seq.*

I. BACKGROUND

Eckerd operates a nationwide chain of retail drug stores throughout the United States, including the State of Georgia. Management of the drug stores is divided into geographical regions. The relevant region, the Mid-South Region ("Region") is comprised of drug stores in Georgia, Tennessee, Mississippi, and South Carolina. The

Mid-South Region is divided into ten districts, each of which is managed by a District Operations Manager ("DOM").

Newman began working for Eckerd as an hourly associate in 1971 in Sarasota, Florida. Newman held various positions and received promotions to various positions including managerial positions. Newman became a DOM for the Northern Georgia District in approximately 1992, and transferred to the Northeast Georgia District as its DOM in 1995. Newman served as DOM in the Northeast Georgia District until February 1998, when he was demoted to the position of Store Manager. Plaintiff is currently employed by Eckerd as a Store Manager in Canton, Georgia.

Doug Sheasley[1] became the Vice President of the Mid South Region in July 1996.[2] Shortly thereafter, Sheasley spent time becoming familiar with store operations and personnel in this region, and continued those efforts throughout the remainder of 1996. In January 1997, Sheasley evaluated each DOM's performance. Sheasley met with Newman on January 21, 1997, to discuss his evaluation of Newman's 1996 performance. Sheasley discussed numerous issues with Newman's job performance and the financial performance of the stores in his district. Sheasley expressed particular concern about the district's Earnings Before Interest and Taxes ("EBIT"), which

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[1] Individuals referenced in this order will be referred hereinafter by the individual's last name, i.e. Doug Sheasley will be referred to as simple "Sheasley."

[2] Sheasley replaced the former regional Vice President, Bruce Barkus, and became Newman's immediate supervisor.

reflects the overall profitability of the stores. Newman's district had a EBIT that was 13.6% below the year's plan goals. Additionally, Sheasley counseled Newman on the critical need that he make frequent visits to the stores in his district in order to effectively manage them. Based on his assessment of Plaintiff's job performance, Sheasley gave Plaintiff the performance rating of 3 out to 5 for 1996.[3] Sheasley told Newman that his job performance must improve for 1997 or he faced receiving an unsatisfactory job rating. Sheasley documented this performance-appraisal meeting in a memorandum which noted the financial problems in Newman's district and his managerial perspective that Newman had the following non-financial performance problems; i) staffing issues; ii) training problems, iii) infrequent store visits, iv) non-compliance with store standards, and company operating procedures and programs, and v) teamwork deficiencies with other employees in the region.[4]

Despite Sheasley's feedback to Plaintiff regarding his job performance, he continued to receive reports in 1997 from regional staff members stating that Newman was

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[3] On a scale of 1 to 5, 1 is the highest performance score, 3 is satisfactory, and 5 is the lowest performance score. Plaintiff's 1996 performance rating is reflected in Ex. 7 of Newman's deposition and Sheasley Dep. pg. 14 and Ex. 12.

[4] Defendant contends that Plaintiff knew of many of these problems prior to his appraisal with Sheasley based on feedback from Store Managers that he supervised. Plaintiff admits that he knew improvement was needed in his district in 1996. Plaintiff was also aware of feedback from the Store Managers in Plaintiff's district of his need for improved managerial interaction.

not effectively managing his stores.[5] Sheasley visited several of Newman's stores in December 1997, including a store that was scheduled for a grand opening two days later, which was in a crisis state based on Sheasley's assessment. Based on his continued observation throughout 1997, Sheasley determined that Newman was not performing satisfactorily as a DOM and should be removed from that position. Sheasley shared his observations with Newman, including his loss of confidence in his ability to meet the job responsibilities of a DOM, and the need to remove him from the position. Although Newman questioned Sheasley about his decision to remove him from the position, he soon began to pursue other opportunities in the Company. Sheasley assisted Newman in locating another position within the Company within comparable salary and benefit ranges. Shortly thereafter, Sheasley also prepared a 1997 performance review for all ten DOMs in the region, and ranked Newman last among the ten. Sheasley assigned Newman an unsatisfactory 1997 performance rating of 4 out of 5.[6]

Sheasley selected Dennis Mack to replace Newman as DOM in the Northeast Georgia District with an effective date of February 1, 1998, the beginning of Eckerd's fiscal year. Mack had been DOM in the Mississippi District

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[5] Beginning in Fall 1997, Loss Prevention Representatives reported concerns about Newman's stores, including concerns regarding the condition of the stores, the lack of training of Store Managers, and Plaintiff's failure to visit the stores on a regular basis to provide guidance to the Store Managers.

[6] As a result of this rating, Plaintiff was ineligible for a performance bonus for 1997 under Eckerd's Key Management Bonus Plan, which requires a rating of 3 or above.

since 1995, and he had worked as a previous store manager and a DOM in the Atlanta area for a period of time. In the overall DOM assessment that Sheasley conducted in late 1997, he ranked Mack third highest performing DOM in the region, with a performance rating of 2 for 1997.[7] After deciding to replace Newman with Mack, Sheasley need [sic] to select a replacement for Mack's former position as DOM of the Mississippi District. He selected Scott DeFriese, a Store Manager in Tennessee.[8]

Shortly after assuming the position, Mack assessed the condition of the stores in his new district and sent a written report of his findings to Sheasley. This report

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[7] Sheasley maintains that he was unaware of either Plaintiff's or Mack's age at the time he made the demotion decision and the decision to replace Newman with Mack. Plaintiff does not rebut this assertion.

[8] Plaintiff maintains that he was actually replaced by DeFriese, not Mack, by positing that what really happened is Defendant promoted DeFriese (who was 33 years old) and simply divided his stores among two other current DOM's. Essentially, Plaintiff contends that Mack did not replace him. The evidence reflects that Eckerd restructured the assignment of stores in the region, but not until April 1998, and as a result, some of Newman's previous stores which Mack now managed were reassigned to Jeff Morgan, another DOM. Sheasley also maintains that he was unaware of Morgan's age at the time that he made these staffing decisions.

Sheasley was 43 years old at the time these decisions were made. Newman was 45 years old when he accepted the demotion. Mack and Morgan were 45 years old just like Newman. Considering all the DOMs in the Mid-South Region at the time of Newman's demotion, four DOMs were older than Newman, three were his same age, and two were slightly younger, ages 39, and 34.

paralleled Sheasley's observations, that generally the stores were in bad shape.

In the interim, Sheasley continued to assist Plaintiff in his efforts to locate a comparable management-level position. By February 1998, however, Plaintiff had not secured another job. Sheasley offered Plaintiff the option of stepping down to a Store Manager position since he could not obtain any other management job. Additionally since the time that Mack took over Newman's district, Newman's efforts focused on the job search. During that time, Sheasley authorized Eckerd to continue paying Newman his full DOM salary while he took a personal leave of absence. Shortly thereafter, Newman accepted a Store Manager position in Canton, Georgia near his home. Newman began this new position the second week of March 1998.

Newman never complained to Sheasley or any other member of Eckerd's management team about any perceived or alleged age discrimination prior to the filing of his charge of discrimination with the EEOC in April 1998. Eckerd maintains a policy that promotes equal employment opportunity, and Plaintiff was aware of this policy.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed. R. Civ. P. 56(c). The movant carries the initial burden of showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). "Only when that burden has been met does the burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The non-movant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions, and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

A court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988); *Tippens v. Celotex Corp*, 805 F.2d 949, 953 (11th Cir. 1986); *reh'g denied*, 815 F.2d 66 (11th Cir. 1987). However, Rule 56 "[b]y its very terms. . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no genuine issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The materiality of facts is governed by the substantive law. *Id.* at 248, 106 S.Ct. at 2510.

In addition, on a motion for summary judgment, the non-moving party still bears the burden of coming forth with sufficient evidence on *each* element that must be proved. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080

(11th Cir. 1990) (emphasis in original); *See Celotex*, 477 U.S. at 322-23. In *Early*, [sic] the Eleventh Circuit further emphasized:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . . . Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . In such circumstances, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial . . . If the evidence is *merely colorable*, or is *not significantly probative*, summary judgment may be granted.

Id. (emphasis in original) (citations omitted).

Further, "[i]n an employment discrimination case, the plaintiff must produce sufficient evidence to support an inference that the defendant-employer based its employment decision on an illegal criterion." *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997). Summary judgment in favor of the defendant-employer is proper unless the plaintiff puts forth " 'sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action.' " *Id.* (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998)).

B. Analytical Framework

Similar to a Title VII plaintiff, an ADEA plaintiff may prove age discrimination through either direct, statistical, or circumstantial evidence. In the present case, the EEOC has not presented any direct or statistical evidence of discrimination. As such, Newman's age discrimination claim is to be analyzed under the framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this framework, a plaintiff must first establish a prima facie case of discrimination. *Id.* at 802, 93 S.Ct. at 1824. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). To satisfy its burden of production, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons . . . [T]he employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Id.* 254, 257, 101 S.Ct. at 1094, 1096. Once the defendant articulates a legitimate non-discriminatory reason for its action, the presumption of discrimination drops from the case, leaving the plaintiff with the ultimate burden of proving that the reasons proffered by the defendant are a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

C. Prima Facie Case

To make out a prima facie case, Newman must show that he: 1) is at least 40 years of age; 2) was adversely affected by an employment action; 3) was replaced by someone substantially younger; *and* 4) was qualified to perform his job at the time of the adverse action. *Wisdom v. M.A. Hanna Co.*, 978 F.Supp. 1471, 1476 (N.D. Ga. 1997) (citing *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996)), *aff'd without op.*, 141 F.3d 1190 (11th Cir. 1998). Thus, Eckerd is entitled to summary judgment if Plaintiff cannot make a prima facie case of age discrimination. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 (11th Cir. 1998) ("summary judgment against plaintiff is appropriate if he fails to satisfy any one of the elements of a prima facie case."), *cert. denied*, 119 S.Ct. 405 (1998).

It is clear in this case that Newman is in the protected age category and that he suffered an adverse employment action. It is undisputed, however, that Mack, who was also 45 years old, took over managing the Northeast Georgia District after Newman was demoted. After Sheasley reorganized the region in April 1998, Newman's former district then managed by Mack was divided between Mack and Morgan, who was 45 years old as well. The record is undisputed that Newman was not replaced by employees substantially younger than him in his former job as DOM of the Northeast Region. Plaintiff alleges, however, that he was replaced by DeFriese who was 33 years old. The evidence does not support Plaintiff's contention. DeFriese was promoted from Store Manager to a DOM position in the Mississippi District, Mack's

former district. There is no evidence to suggest that DeFriese assumed any of Newman's job responsibilities in the Northeast Georgia District.[9] Plaintiff testified that DeFriese was in fact promoted to cover Mack's vacant Mississippi District. The fact that DeFriese was promoted into a DOM position in another district leads [sic] no credence to Plaintiff's assertion that DeFriese replaced him. See *Hawkins v. Ceco Corporation*, 883 F.2d 977, 982 (11th Cir. 1989) (plaintiff must show that the purported replacement actually performed his/her former job duties); *Wisdom*, 978 F.Supp. at 14278 [sic] (age discrimination plaintiff failed to show that he was replaced because alleged replacement worked in position different than plaintiff's former position).

Although the court's analysis could end here since it has identified one element of a prima facie case that Plaintiff cannot meet, the court will next examine whether Newman was qualified to perform his job at the time of his demotion. Defendant asserts that he was not. While Plaintiff claims he was performing at a satisfactory level, the evidence shows that Plaintiff was experiencing problems managing his district even before his demotion. After evaluating Newman's district for several months

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[9] The court is not convinced by Plaintiff's attempt to paint the picture that he was really replaced by DeFriese. Moreover, the fact that his district was ultimately realigned and divided between Mack and Morgan is not evidence of intentional discrimination, but indicative of a regional restructuring. Even if both Mack and Morgan had been younger than Newman, the reorganization as implemented would be insufficient to establish discrimination. *Thurman v. Robert Shaw Control Co.*, 869 F.Supp. 934, 940 (N.D. Ga. 1994).

after he assumed the Regional Vice President position, Sheasley observed problems in Newman's district, which manifested into financial problems including declining profitability. Upon evaluating Newman's job performance is January 1997, Sheasley's [sic] evaluated Plaintiff's performance as only marginally satisfactory, and determined that his performance issues included training and staffing issues, ineffective managing including infrequent visits to the stores in his district, noncompliance of stores with company standards, and teamwork issues. Sheasley met with and discussed his feedback with Newman during an appraisal meeting. In that meeting Sheasley told Plaintiff that his job performance had to improve. Sheasley memorialized in writing his assessment of Newman's performance and the information relayed in this meeting. Thus, Plaintiff had notice that he was experiencing performance problems. In fact, the evidence shows that Plaintiff may have had knowledge of issues in his district as early as November 1997.[10] Additionally, based in part on a peer review process conducted by Eckard's Human Resource department, Newman was aware that the Store Managers in his district had some critical perceptions of his managerial skills. Sheasley was 43 years old at the time these decisions were made.

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[10] Exhibit 27 of Plaintiff's Opposition to Defendant's Summary Judgment Motion Plaintiff also admits that he perceived problems in his district from day 1. Newman Aff. ¶¶ 15, 17, 19-34, 38, 50, 56, 76. As the DOM, Plaintiff was ultimately responsible for addressing and solving the problems in his district, that was a significant portion of his fundamental job duties as a DOM. Contrary to Plaintiff's assertions, there is no evidence that Defendant set Plaintiff up to fail.

Despite the knowledge of his performance problems. Sheasley continued to observe and receive reports, which corroborated his assessment of Newman's performance.[11] When Sheasley conducted an evaluation of all ten DOM's at the end of 1997, Newman ranked last and Sheasley assigned him a performance rating of 4 out of 5. Sheasley ultimately removed Plaintiff from the DOM position because of his assessment that Newman could no longer effectively perform his job as a DOM. After notice of his intention to remove him from the DOM position in December 1997, Sheasley actively worked with Plaintiff to secure another comparable management-level job.

Plaintiff has offered no credible evidence to controvert Defendant's assessment of his qualifications upon demotion.[12] In fact, the record reflects that Plaintiff was experiencing problems in his district before Sheasley

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[11] After Mack effectively became the DOM for Northeast Georgia he conducted an assessment of Newman's former stores and shared with Sheasley the results in a written report.

[12] Plaintiff asserts that because he received a bonus sometime in March-April 1998, Sheasley had to certify that he was performing at least at a level 3 out of 5 for 1997. As such, Plaintiff avers that demonstrates that he was qualified at the time of his demotion in 1997. The record reflects, however, that Plaintiff did in fact receive a 4 rating for fiscal year 1997. Additionally, Mark Chidester, Director of Field Human Resources, testified that Newman did not receive a bonus in April 1998. Newman's claim that he received $12,000.00 in excess income and his assumption that it constituted a bonus payment is not supported by the record. As Defendant avers this happenstance could have been an administrative error. Even if true, the receipt of the excess income alone does not constitute evidence of age discrimination. Plaintiff's assertions are speculative and do not raise an inference of discrimination.

became the Regional Vice President. Those problems continued in some magnitude thereafter until Sheasley decided to remove Plaintiff from the DOM position. Thus, the fact that Plaintiff faced performance challenges was no surprise, least of all to Plaintiff himself. Accordingly, this court finds that Plaintiff was no longer qualified to effectively perform his job as DOM at the time of his demotion. Based on the court's analysis herein, the court concludes that Plaintiff fails to meet his initial burden to establish a prima facie case.

D. Legitimate Non-Discriminatory Reason For Employment Action

Even assuming that Plaintiff could establish a prima facie case, Eckerd has articulated a legitimate non-discriminatory reason for its decision to demote Plaintiff.[13] After several conversations regarding problems in his district, an unsatisfactory performance review, and ongoing performance issues, Sheasley lost confidence in Plaintiff's ability to perform as a DOM. Consequently, Sheasley decided to remove Plaintiff from that job. Clearly, Defendant had a non-discriminatory reason for demoting Plaintiff.[14]

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[13] Defendant's burden is exceedingly light in that it is one of production, not persuasion, *St. Mary's Honor Center*, 509 U.S. at 510-11.

[14] AT this point in the analysis, it is not the court's job to address the soundness of Eckerd's decision to demote Plaintiff.

E. Pretext

The record does not suggest and Plaintiff has presented no credible evidence that the reasons given by Eckerd for Plaintiff's demotion were a pretext for age discrimination. Indeed there is no evidence in the record suggesting that the decision maker in this case, Sheasley, considered Newman's age in deciding to remove him from the DOM position and to assign Mack to replace him. In fact, Sheasley was unaware of either Newman's, Mack's or Morgan's age at the time of the various relevant employment decisions.[15] Contrary to Plaintiff's assertions, there is no evidence that Eckerd carried out a scheme to promote DeFriese because of his youth. Eckerd simply sought to fill a position that was vacant due to Mack's lateral move to the Northeast DOM position. Moreover, Sheasley observed Plaintiff for more than a year before effectively demoting him. Thus, Sheasley did not seek to immediately remove Plaintiff from his position without notice and an opportunity to improve his performance. Notwithstanding his decision to demote Plaintiff, the record reflects that Sheasley made considerable effort to assist Plaintiff in locating another comparable managerial position with Eckerd.[16]

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[15] The court notes that at the time of Newman's demotion, four DOM's were older than Newman, three were his same age, and two were younger.

[16] Additionally, Sheasley authorized Eckerd to continue paying Newman his DOM salary for several weeks after his demotion but before Plaintiff accepted another position. After Plaintiff accepted the Store Manager job in Canton, Georgia, Sheasley authorized that his salary be decreased in $100.00 increments as to gradually place his salary in line with the maximum Store Manager pay scale.

Although the court will not second guess Sheasley's assessment of Plaintiff's job performance, the court considers whether Sheasley's evaluation was honestly held, that is, if he genuinely believed that the basis for his evaluation was accurate and true at the time it was made. *Elrod v. Sears, Roebuck & Company*, 939 F.2d 1466, 1471 (11th Cir. 1991). Whether Sheasley demoted Newman "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all," the court will not judge his "belief" as long as it was not for a discriminatory reason such as Plaintiff's age. *Godby v. Electrolux Corp.*, No. 1 93-CV-0353-ODE, 1994 U.S. Dist. LEXIS 19831, at *38 (N.D. Ga. Sept. 28, 1994) (citations omitted), *aff'd*, 58 F.3d 641 (11th Cir. 1995), *cert. denied*, 517 U.S. 1120 (1996); *See also McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998) (when employer's motivation for termination was based on good faith belief, it does not become "pretextual even if the belief was later found to be erroneous"). Plaintiff has the ultimate burden of proving that age was the determining factor in Eckerd's decision to demote him. *Watkins v. Sverdrup*, 153 F.3d 1308, 1314 (11th Cir. 1998).

As evidence of pretext, Plaintiff offers some alleged age-related comments made by Sheasley and Barkus, Sheasley's predecessor, about his gray hair.[17] Specifically,

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[17] Barkus was not the decision maker for the actions Plaintiff's [sic] alleges against Eckerd in this case. There is no evidence that Barkus was involved in the decision to demote Newman. Plaintiff attempts to show pretext by alleging a conspiracy and/or that he "now believes" Barkus intended to frustrate him and to make him fail. The record reflects no such evidence. Plaintiff offers no more than his bald conclusory

Plaintiff alleges that Sheasley made a few comments about him being an "older" a "senior guy." Plaintiff also claims that Sheasley commented on Plaintiff's gray hair "then said he didn't have a lot of room to talk because he was getting bald." The comments taken in context are even arguably complimentary or at least not derogatory.[18] Thus, the court concludes that the comments taken in context are stray remarks and not enough to raise an inference of age discrimination. *See e.g. Nesbit v. Pepsico*, 994 F.2d 703, 705 (9th Cir. 1993) (supervisor's statement to plaintiff that "we don't necessarily like grey hair" failed to create an inference of age discrimination).

Additionally, Plaintiff attempts to convince this court that Eckerd's reasons for his promotion [sic] amount to pretext in that the Company allegedly failed to follow its own disciplinary policy in handling his performance issues. The court finds, however, that whether Eckerd's actions comported with its disciplinary policy in all respects,[19] the primary question is whether or not

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allegations and speculation about Barkus, which are insufficient to establish discriminatory animus. *Rollins v. TechSouth*, 833 F.2d 1525, 1529 (11th Cir. 1987). Any alleged comments by Barkus are certainly stray remarks in that Barkus had not been Plaintiff's supervisor for at least 18 months before his demotion. As such any comments by Barkus are clearly not connected to Eckerd's decision to demote Plaintiff.

[18] Plaintiff admits that he believes that he and Sheasley had a good relationship prior to his demotion.

[19] There seems to be no dispute that Eckerd did comply with some aspects of its disciplinary policy. Additionally, the court points out as Mr. Chidester testified, that employers (including Eckerd) are more flexible and creative in dealing with performance problems of higher-level employees, such as managerial employees.

evidence of discriminatory animus exists. This court finds no evidence of such discriminatory intent from which age discrimination could be inferred. Accordingly, Newman's claim for age discrimination against Eckerd must be dismissed.

III. CONCLUSION

Based on the reasons set forth in this order, Defendant's Motion for Summary Judgment [Doc. No. 12-1] is **GRANTED.** This action is **HEREBY DISMISSED.**

SO ORDERED this 20th day of March, 2000.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES
DISTRICT JUDGE

Section 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Section 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures –

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change

the lower or upper age limits set forth in section 631 of this title.

Section 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101-239, title VI, Sec. 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the –

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits –

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan –

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year

shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age. The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the

extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection –

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained –

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of –

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26) that –

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age) –

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions) –

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if –

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does

not require retirement to occur sooner than 180 days after such election.

Section 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include –

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

Section 625. Administration

The Secretary shall have the power –

(a) Delegation of functions; appointment of personnel; technical assistance to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

Section 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as

prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice Section 259 of this title shall apply to actions under this chapter.

If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the

protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Section 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

Section 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

Section 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

Section 630. Definitions

For the purposes of this chapter –

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with

employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 et seq.); or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia,

or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 et seq.).

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.).

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

Section 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement

benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

Section 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

Section 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Section 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission; and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this

section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall –

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age. The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational

qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

Section 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.